

DECISION

Support
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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-215105**DATE:** October 24, 1984**MATTER OF:** Rex Systems, Incorporated**DIGEST:**

1. Under our Bid Protest Procedures, a protest must be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier. FOIA request does not toll that requirement.
2. Protest untimely filed with procuring agency (more than 10 days after basis of protest was known) and then filed with GAO after denial by contracting officer is not for consideration on merits under 4 C.F.R. § 21.2(a) which requires that initial protest to agency be filed on timely basis.
3. Protest issue, that awardee failed to acknowledge an amendment, filed within 10 days after receipt of awardee's amendment requested under FOIA is timely.
4. Failure of low bidder to provide proof with bid that the product offered has "current approval" was properly waived as a minor informality where bidder offered United States government surplus item and no bidders were prejudiced by failure to comply with requirement.

Rex Systems, Incorporated (Rex), protests the award of a contract to Columbia Electronics International, Inc. (Columbia), under invitation for bids (IFB) No. DAAB07-83-B-0184, issued by the United States Army Communications - Electronics Command (Army), Fort Monmouth, New Jersey. Rex contends that Columbia's bid is nonresponsive because it (1) offered to supply United States unused, new, government surplus items; (2) failed to acknowledge receipt of amendment No. 0001; and (3) Columbia was improperly permitted to supply information after bid opening concerning the source of the items offered contrary to the government surplus clause in Defense Acquisition Regulation (DAR) § 7-104.49, reprinted in 32 C.F.R. pts 1-39 (1983).

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We dismiss in part and deny in part the protest.

The IFB called for 18 Electronic Subassembly P/O AN/RRC-41 Radio Set IAW Collins Radio Company Drawing No. 528-0373-005. Bids were opened October 18, 1983, and award was made to Columbia on February 1, 1984. The Army contends that Rex's protest is untimely under our Bid Protest Procedures since it was not filed with the contracting agency until April 5, 1984. The agency states that Rex knew or should have known about any government surplus issue as early as December 13, 1983, when Rex raised the issue of the availability and reliability of any government surplus. The agency further argues that if Rex needed any further information, the firm should have requested it at that time. On February 6, 1983, Rex made a Freedom of Information Act (FOIA) request for the Columbia bid set, the contract, and the preaward survey. All but the preaward survey and amendment No. 0001 were forwarded to Rex on March 12, 1984. By letter dated April 11, 1984, the amendment was furnished.

The agency denied Rex's protest as untimely by letter of April 17, 1984, and Rex protested to our Office by letter of April 26, which was filed (i.e., received) here on May 1, 1984.

Rex contends that its protest is timely because it did not know all the grounds for its protest until it received the Army's letter dated April 11, which provided Rex with additional information it had requested under FOIA, including a copy of Columbia's amendment.

Section 21.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1984), provides that protests must be filed (i.e., received) within 10 working days after the basis of the protest is known or should have been known, whichever is earlier. The protest filed with the agency on April 5 alleged that the bid of Columbia government surplus was nonresponsive and that the bid failed to comply with the government surplus clause.

We agree with the Army that Rex knew as early as December 13, 1983, that Columbia intended to furnish government surplus. If further information was needed Rex should have requested it at that time as it is incumbent upon a potential protester to diligently seek whatever relevant information is needed to determine whether a basis

for protest exists. Hydro Research Science, Inc., B-211991, Nov. 17, 1983, 83-2 C.P.D. ¶ 577; Policy Research Incorporated, B-200386, Mar. 5, 1981, 81-1 C.P.D. ¶ 172.

Even assuming Rex did not obtain the needed information concerning the surplus issue until the March 12, 1984, FOIA response, the protest filed with the agency on April 5, 1984, concerning this issue is untimely and will not be considered on the merits. For the protest to GAO to be timely, the initial protest to the agency must have been filed in accordance with the 10-day rule cited above. 4 C.F.R. § 21.2(a). Since the protest regarding the government surplus issue was not timely filed with the agency, more than 10 days after receipt of the March 12 letter, this protest issue is also untimely filed with our Office. Municipality of Anchorage, B-215100, May 22, 1984, 84-1 C.P.D. ¶ 557; Halifax Engineering, Inc., B-209822, Dec. 15, 1982, 82-2 C.P.D. ¶ 537.

We agree with Rex's argument that Columbia's alleged failure to acknowledge amendment No. 0001, was not known until it received a copy of Columbia's amendment with the Army's April 11, 1984, letter. Apparently, a copy of Columbia's amendment was not sent to Rex on March 12 when the other information was furnished pursuant to the FOIA request. While this protest issue is timely, it is denied since Columbia did in fact acknowledge amendment No. 0001 when it submitted its proposal.

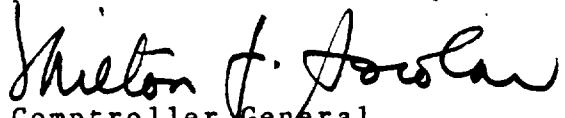
Rex also contends that Columbia's failure to comply with the following paragraph of the amendment rendered its bid nonresponsive and that the agency should not be permitted to determine after bid opening whether such failure is a minor informality. The pertinent portion of amendment 0001 states:

"Offers from sources whose product does not have current approval as a result of (1) previously supplying the subject item of the solicitation to the Government, (2) furnishing subject item to the original equipment manufacturer, or (3) specifying that the subject item will be supplied by firms identified in (1) or (2) above, will not be considered for award for this procurement. Proof of (1), (2) or (3) above must be furnished with your quotation, or it will be rejected as nonresponsive."

The agency contends that Columbia, by indicating it was supplying the item from United States government surplus, satisfied the requirement that it was supplying an acceptable item and not a "substitute brand" or "equal" item. The Army states that to require proof of prior approval from the original manufacturer (Collins) would preclude bids from those firms that had purchased the drawings or those that had the desired item on hand as government surplus in their inventory. Therefore, the agency states that the failure to provide the required documentation was a minor informality not otherwise prejudicial to other bidders. See International Harvester Company, B-212341, Sept. 12, 1983, 83-2 C.P.D. ¶ 313.

The Army concedes that Columbia failed to provide proof with its bid that it had previously supplied the subject item to the government or furnished it to the original equipment manufacturer or that it was supplying the item through such a firm. However, in our view Columbia's failure to submit the required information with its bid was a minor informality waivable in accordance with Defense Acquisition Regulation § 2-405, reprinted in 32 C.F.R. pts. 1-39 (1983), since such failure did not prejudice Rex or any other bidder. Columbia, by indicating it was supplying the item from United States government surplus, satisfied the requirement that it was supplying an acceptable item and not a "substitute brand" or "equal" item and was bound to comply with all contract requirements.

The protest is denied in part and dismissed in part.


Acting Comptroller General
of the United States